

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CODY NICHOLS,	)	Civil No. 07cv2039-L(NLS)
	)	
Plaintiff,	)	
	)	
v.	)	<b>TEMPORARY RESTRAINING</b>
	)	<b>ORDER AND ORDER TO SHOW</b>
DEUTSCHE BANK NATIONAL TRUST	)	<b>CAUSE RE: PRELIMINARY</b>
COMPANY, as Trustee for Morgan	)	<b>INJUNCTION</b>
Stanley Loan Trust 2006-HE4, <i>et al.</i>	)	
	)	
Defendants.	)	

Plaintiff Cody Nichols, owner of his principal residence located at 2010 Rancho Manzanita in Boulevard, California (“Property”), refinanced the mortgage on the Property. Subsequently, he filed a complaint pursuant to the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601 *et seq.* to enforce his right to rescind a consumer credit transaction, void Defendants’ security interest in the Property and avoid foreclosure. Pursuant to 28 U.S.C. § 1331, the court has subject matter jurisdiction over the case, because the action arises under TILA, a federal statute.

On October 16, 2007, Plaintiff sent Defendants a Notice of Rescission of Mortgage, requesting, among other things, that the foreclosure be postponed or cancelled. On November 19, 2007, Plaintiff filed an application for a temporary restraining order (“TRO”) and preliminary injunction, seeking to enjoin the foreclosure sale, currently scheduled for November

1 26, 2007. Defendants were served with Plaintiff's moving papers on November 2 and 5, 2007,  
2 respectively, at least two weeks before Plaintiff filed them with the court, however, they have  
3 not responded. Because it is unopposed (*see* Civ. L. Rule 7.1(f)(3)(c)) and for the reasons which  
4 follow, Plaintiff's TRO application is **GRANTED**.

5 In February 2006, Plaintiff refinanced the Property by entering into a promissory note  
6 with Defendant Decision One Mortgage Company, LLC ("Decision One"), secured by a first  
7 deed of trust on the Property. The proceeds were used to pay off the existing mortgage held by a  
8 third party lender. Subsequently, Decision One sold the mortgage to Defendant Deutsche Bank  
9 National Trust.

10 Plaintiff was not provided with copies of the loan documents when he signed them. On  
11 February 24, 2006, a Friday, at approximately 8 p.m., lender's notary came to Plaintiff's home  
12 with the loan papers for Plaintiff to sign. Plaintiff was rushed by the lender's notary and did not  
13 have an opportunity to read the documents. Plaintiff was not left with a copy of the documents,  
14 but was told they would arrive by mail at a later date. However, the documents did not arrive.  
15 Plaintiff's mother, who also resides at the Property, subsequently called the lender and requested  
16 a copy of the documents. A package was sent on May 16, 2006, which contained certain  
17 unsigned documents, including a Notice of Right to Cancel, stating Plaintiff had until February  
18 28, 2006 to cancel the loan. Plaintiff therefore believed the time to cancel had expired. When  
19 Plaintiff defaulted on the loan, a foreclosure date was set.

20 Plaintiff argues that because Defendants did not make all the material disclosures required  
21 by TILA, his right to cancel the loan was extended to three years. On October 16, 2007,  
22 Plaintiff's counsel sent a Notice of Rescission of Mortgage to Defendants and requested that the  
23 foreclosure be postponed or cancelled. Defendants did not directly respond to the notice, but  
24 advanced the foreclosure date from November 2 to October 30, 2007. Due to the county-wide  
25 wildfire emergency the week of October 22, 2007, the sale was postponed until Monday,  
26 November 26, 2007. Plaintiff argues that his notice of rescission was timely, it voids  
27 Defendants' security interest in the Property, and is therefore sufficient to avoid foreclosure.

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1 Preliminary injunctive relief, including a TRO, “is not a preliminary adjudication on the  
 2 merits, but a device for preserving the *status quo* and preventing the irreparable loss of rights  
 3 before judgment.” *Textile Unlimited, Inc. v. A.BMH and Co., Inc.*, 240 F.3d 781, 786 (9th Cir.  
 4 2001). “The *status quo ante litem* refers not simply to any situation before the filing of a  
 5 lawsuit, but instead to the last uncontested status which preceded the pending controversy.”  
 6 *GoTo.com, Inc. v. The Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). A party seeking  
 7 preliminary injunctive relief, including a temporary restraining order, under Rule 65 must show  
 8 either (1) a combination of probable success on the merits and the possibility of irreparable  
 9 harm, or (2) that serious questions going to the merits are raised and the balance of hardships tips  
 10 sharply in the moving party's favor. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115,  
 11 1119 (9th Cir. 1999). “These two formulations represent two points on a sliding scale in which  
 12 the required degree of irreparable harm increases as the probability of success decreases.” *Roe*  
 13 *v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998).

14 “TILA and Reg Z contain detailed disclosure requirements for consumer loans. A  
 15 lender's violation of TILA allows the borrower to rescind a consumer loan secured by the  
 16 borrower's primary dwelling. Technical or minor violations of TILA or Reg Z, as well as major  
 17 violations, impose liability on the creditor and entitle the borrower to rescind.” *Semar v. Platte*  
 18 *Valley Fed. Sav. & Loan Ass’n.*, 791 F.2d 699, 703-04 (9th Cir. 1986) citing 15 U.S.C.  
 19 § 1635(a). “TILA required that the documents state specifically the last date on which the  
 20 [borrower] could rescind the loan agreement without penalty. TILA’s ‘buyer’s remorse’  
 21 provision allows borrowers three business days to rescind, without penalty, a consumer loan that  
 22 uses their principal dwelling as security. TILA and its regulations, issued by the Federal  
 23 Reserve System, 12 C.F.R. §§ 226.1- .29 (‘Reg Z’), require the lender to provide a form stating  
 24 the specific date on which the three-day rescission period expires. If the lending institution  
 25 omits the expiration date and fails to cure the omission by subsequently providing the  
 26 information, the borrower may rescind the loan within three years after it was consummated.”  
 27 *Id.* at 701-02, citing 15 U.S.C. § 1635(a) & (f); 12 C.F.R. § 226.23(b)(5). If the borrower timely  
 28 exercises his

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2 or her right to rescind, “the security interest giving rise to the right of rescission becomes void . .  
3 ..” 12 C.F.R. § 226.23(d).

4 Because Plaintiff was not provided with notice of the last date on which he could rescind  
5 the transaction until after the period had expired, it appears Defendants did not provide him with  
6 material disclosures as required by 15 U.S.C. § 1635(a) and Reg Z. It is therefore very likely  
7 Plaintiff could prevail on the argument he was entitled to rescind the loan within three years of  
8 February 24, 2006. Because Plaintiff’s rescission letter was sent within this time period, it is  
9 very likely that the lender’s security interest in the Property is void. The lender cannot foreclose  
10 on the Property without a security interest. The court finds Plaintiff has shown a strong  
11 probability of success on the merits.

12 The court next considers whether Plaintiff has also made the requisite showing of  
13 possibility of imminent irreparable harm. *See Sun Microsystems*, 188 F.3d at 1119. Plaintiff  
14 maintains that a loss of his home to foreclosure would constitute irreparable harm not only  
15 because his home is unique to him but also because his father, who is severely ill, resides at the  
16 Property and likely would be severely impacted if he had to leave. The court finds that the  
17 imminent foreclosure of Plaintiff’s residence presents a threat of irreparable harm. *See*  
18 *Sundance Land Corp. v. Comty First Fed. Sav. & Loan Ass’n*, 840 F.2d 653, 661 (9th Cir. 1988)  
19 (foreclosure of real property irreparable harm).<sup>1</sup> On balance, the court also finds that the harm  
20 likely to result to Plaintiff from foreclosure substantially outweighs any financial harm to  
21 Defendants if the restraining order is improperly granted.

22 For the foregoing reasons, Plaintiff’s application for a temporary restraining order is  
23 **GRANTED** pending a hearing on his motion for a preliminary injunction.

24 Accordingly, **IT IS HEREBY ORDERED** that Defendants Deutsche Bank National  
25 Trust Company, as Trustee for Morgan Stanley Loan Trust 2006-HE4, and Decision One

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27 <sup>1</sup> In addition, the court notes that Plaintiff’s right to rescind expires upon the sale of  
28 the property. 12 C.F.R. § 226.23(a)(3). If the foreclosure is allowed to proceed, he will lose his  
right to rescind the loan transaction.

1 Mortgage Company, LLC and their servicers, agents, assigns, employees, officers, attorneys, and  
2 representatives are **HEREBY RESTRAINED AND ENJOINED** from engaging in or  
3 performing any act to deprive Plaintiff of ownership and/or possession of the real property  
4 located at 2010 Rancho Manzanita, Boulevard, California 91905 ("Property"), including but not  
5 limited to instituting, prosecuting, or maintaining foreclosure or sale proceedings on the  
6 Property, from recording any foreclosure instrument, deeds or mortgages regarding the Property  
7 or from otherwise taking any steps whatsoever to deprive Plaintiff of ownership and/or  
8 possession in the Property, and in particular from proceeding with the sale of the Property  
9 scheduled for November 26, 2007.

10 This Temporary Restraining Order is effective immediately. As security pursuant to Rule  
11 65(c) of the Federal Rules of Civil Procedure, the deed of trust shall remain on the Property as  
12 security for the payment of such costs and damages as may be incurred or suffered by any party  
13 who is found to have been wrongfully enjoined or restrained.

14 **IT IS FURTHER ORDERED** that this Temporary Restraining Order shall be binding on  
15 the parties to this action and all other persons or entities who receive actual notice of this order.

16 Defendants Deutsche Bank National Trust Company, as Trustee for Morgan Stanley Loan  
17 Trust 2006-HE4, and Decision One Mortgage Company, LLC are **HEREBY ORDERED TO**  
18 **SHOW CAUSE** at 11:00 a.m. on **December 10, 2007** or as soon thereafter as counsel may be  
19 heard in United States District Court for the Southern District of California, Courtroom 14,  
20 located at 940 Front Street, San Diego, CA 92101, why you, your servicers, agents, assigns,  
21 employees, officers, attorneys, and representatives and those in active concert or participation  
22 with you or them, should not be restrained and enjoined pending trial of this action from  
23 engaging in or performing any act to deprive Plaintiff of ownership and/or possession of the  
24 Property, including but not limited to instituting, prosecuting, or maintaining foreclosure or sale  
25 proceedings on the Property, from recording any deeds or mortgages regarding the Property or  
26 from otherwise taking any steps whatsoever to deprive Plaintiff of ownership and/or possession  
27 in the Property, and in particular from proceeding with the sale of the Property.

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2 The briefing schedule for the order to show cause is as follows:

3 1. Plaintiff shall immediately serve Defendants by overnight mail with this order and all  
4 papers it has filed in support thereof. Proof of service shall be filed no later than November 26,  
5 2007.

6 2. No later than November 28, 2007 at 4:30 p.m. Defendants shall file and serve by  
7 overnight mail a memorandum of points and authorities no longer than fifteen (15) pages and  
8 supporting evidence, if any, to show cause why a preliminary injunction should not issue.

9 3. No later than December 4, 2007 at 4:30 p.m., Plaintiff shall file and serve by overnight  
10 mail a responsive memorandum of points and authorities no longer than fifteen (15) pages and  
11 supporting evidence, if any.

12 **IT IS SO ORDERED.**

13  
14 DATED: November 21, 2007

15   
16 M. James Lorenz  
United States District Court Judge

17 COPY TO:

18 HON. NITA L. STORMES  
UNITED STATES MAGISTRATE JUDGE

19 ALL PARTIES/COUNSEL  
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